

RENDERED: March 4, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-001177-MR

PATRICIA VANOVER

APPELLANT

v.

APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 84-CI-00133

DOUGLAS WADE VANOVER
AND WANDA VANOVER

APPELLEES

OPINION
AFFIRMING IN PART;
REVERSING IN PART AND REMANDING

** ** * * *

BEFORE: KNOPF AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Patricia Vanover and Douglas Vanover were divorced on September 28, 1984, and pursuant to an agreement incorporated into the decree, Patricia was awarded custody of the parties' three minor children, and Douglas was to pay \$125 per week child support. Patricia was permitted to retain the marital residence being purchased under a land contract. If sold, she was to pay Douglas \$2,500 from the

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

proceeds. In 1985, Douglas began living again in the marital residence and continued living there the following fourteen years. During the period of cohabitation, Douglas stopped paying child support, and except for one payment made by Douglas, all payments on the land contract were made by Patricia. In 1992, a balloon payment of \$27,998.70 was due and was financed with the note being secured by a joint mortgage obligating the parties as husband and wife. The deed reflects that the parties now own the property jointly as husband and wife.

After Douglas moved from the residence in February 2000, Patricia filed a motion to hold Douglas in contempt for failure to pay child support and requesting that he be ordered to quitclaim to her his interest in the real property. Subsequently, Douglas's new wife was added as a party. The circuit court held that the parties had reconciled and during the fourteen years of cohabitation agreed that Douglas would not be responsible for child support payments, an agreement the court found to be fair and equitable. It also found that as a gift from Patricia Douglas owns a one-half undivided interest in the real estate. Patricia appeals.

The facts come to this court in a somewhat unusual manner. After the designation of record was filed, it was discovered that the tape recording of the Master Commissioner's

hearing was blank and this court entered an order permitting Douglas to take depositions of a witness and of the parties. Although there was no objection by Patricia, the result is that our review is not of the facts as presented to the circuit court. It is as they are presented in the post-hearing depositions. However, based on the findings of the circuit court, the appellate record, and the facts as presented by counsel, there does not appear to be any substantive difference in the evidence.

The gist of Douglas's testimony is that in 1985, the parties began living together but that his occupation as a truck driver kept him away from home an average of four to six days per week. He testified that both parties agreed there was no need for him to continue to write a weekly child support check since he was sharing the expenses. Although he presented various checks written from his account that he claims were for various living expenses, there is no evidence he paid any expenses on a monthly basis or assumed even a portion of the payment on the residence. During the period the parties were living together a new residence was constructed and Douglas presented cancelled checks evidencing payments made from his account toward construction of the residence. He testified that during this period Patricia held herself out to be his wife both in financial and legal documents.

Not surprisingly, Patricia's testimony presents a different history of the parties' relationship. She contends that following the divorce, Douglas would return from his truck driving route and visit the children. When it was time for him to leave, their son would become distraught so she allowed Douglas to stay. Although she testified that she repeatedly asked him to leave and on two occasions sought a restraining order, he remained at the residence for fourteen years. During this time Patricia claims she kept Douglas's clothes in a bag, box, or suitcase, and that he slept in another room. She denies they had any conversation about child support and testified that he did not help with the household expenses until requested to by her oldest daughter. Patricia explained that much of her testimony could not be documented because her daughter, at Douglas's request, removed her financial records from the residence. However, she testified that she made ninety-nine percent of the payments on the property and the new residence was constructed, in part, with money from her savings account. She claims that she did not instruct the bank to prepare the financial documents for the mortgage binding her and Douglas as husband and wife and believed that the deed had to be in their joint names because the land contract was entered into while they were married.

The circuit court found that Patricia had given a one-half interest in the real estate to Douglas; a finding that Patricia argues is not supported by the evidence and an abrogation of her right to enforce the separation agreement. Although under the terms of the land contract legal title remained in the sellers, at the time of dissolution of marriage the parties had an equitable interest in the property that was divisible marital property.² Except for \$2,500 to be awarded Douglas on the sale of the property, Patricia was awarded the entire interest, including all rights under the land contract. Even when spouses remarry each other, the property awarded each in the first dissolution action remains that person's separate and distinct property. And the re-marriage does not annul a separation agreement incorporated into the earlier divorce decree.³ And Kentucky does not recognize common-law marriage and no contractual rights or obligations arise from mere cohabitation.⁴

Douglas contends that Patricia voluntarily gave him an interest in the property when she signed the deed that was made to both of them as joint owners. A discussion of the law concerning gifts, including those made to a long-term

² Sebastian v. Floyd, 585 S.W.2d 381 (Ky. 1979).

³ Gray v. Gray, 745 S.W.2d 657 (Ky.App. 1988).

⁴ Murphy v. Bowen, 756 S.W.2d 149, 150 (Ky.App. 1988).

cohabitating partner is found in Rakhman v. Zusstone,⁵ where the court began its discussion by noting that it has long been the law in Kentucky that "record title or legal title is an indicia sufficient to raise a presumption of true ownership."⁶ And where the transfer of property is made to one who is the natural object of the donor's bounty, it is presumed to be a gift.⁷ In Rakhman, the court expanded the concept of the natural object of one's bounty to include one who resided with the donor for over twelve years, and although unmarried, assumed the donor's surname, had two children with the donor, and shared all the incidents of parenting and marriage with the donor.⁸

While the reasoning in Rakhman is legally sound, it is distinguishable from this case. There is no evidence that following the divorce Douglas and Patricia affirmatively acknowledged an intent to maintain a permanent relationship. There were no subsequent children born, the parties kept separate financial records, and there is no suggestion by either that the parties planned remarriage. Although in certain legal documents, all prepared by third parties, the Vanovers are referred to as husband and wife, this is presumably based on the

⁵ 957 S.W.2d 241 (Ky. 1997).

⁶ Id. at 244.

⁷ Id.

⁸ Id. at 245.

drafter's assumption that the two were married. Patricia's silence and failure to correct those mistakes cannot be equated to the situation in Rakhman where the parties publicly declared their self-proclaimed status as husband and wife and had children bearing the "husband's" surname. There is no presumption that the conveyance to Douglas was a gift and the burden was upon him at the trial level to prove the existence of a valid gift by clear and convincing evidence.⁹

"[W]here property is conveyed as a gift, the transaction is by its very nature unilateral, and the grantees intent or conduct (other than acceptance) plays no part in fixing the rights of the parties."¹⁰ We can find nothing in the record that established by clear and convincing evidence that when the deed was executed in 1992, Patricia's signature signified her intent to give Douglas a one-half interest in the property. To the contrary, she continued to make substantial financial investments in the property and continued to exercise dominion and control. Although not determinative of the issue, over the fourteen years Douglas acquired property and held it in the parties' joint names but upon sale, Douglas held the proceeds individually. There is no testimony that Patricia ever told Douglas she was deeding her interest to him as a gift or

⁹ Knox v. Trimble, 324 S.W.2d 130 (Ky. 1959).

¹⁰ Twyford v. Huffaker, 324 S.W.2d 403, 406 (Ky. 1959).

that either party was aware of the legal effect of the deed. The conduct of the parties indicates that the holding of property in their joint names was not intended to confer joint ownership.

Douglas has failed to show that Patricia intended to give him her share in the property and the evidence compels this court to conclude that the inclusion of his name on the deed as Patricia's husband was a mistake, the legal effect of which was not understood by either party. We are aware of Meyers v. Meyers,¹¹ where an unmarried couple were deeded property jointly and designated as husband and wife. The court rejected the claim that the deed should be reformed, noting that the parties shared their incomes and other properties, including income received from other jointly held property. Although on the facts the court affirmed the refusal to reform the deed, it noted that under certain circumstances it may be appropriate:

[U]nder certain circumstances a deed may be reformed because of a mistake as to its legal effect, and it may be reformed for unilateral mistake where property is conveyed as a gift. . . .¹²

¹¹ 372 S.W.2d 803 (Ky. 1963).

¹² Id. at 804.

In this case, the equitable solution is to reform the deed.¹³ Douglas failed to meet his burden to prove the existence of a gift and the evidence strongly indicates that it was not Patricia's intent to give him her property awarded in the decree but that the designation of Douglas as Patricia's husband was a mistake.

We agree with the circuit court that Douglas is not responsible for approximately \$223,676.59 owed for back child support. Until Douglas began living in Patricia's residence, he paid child support in accordance with the decree. He testified that after that time he and Patricia orally agreed that he would no longer pay child support but would help with the children's expenses. Patricia denies that she entered into any agreement. Oral agreements to modify prospective child support payments are enforceable if they can be proven with reasonable certainty and if the court finds it fair and equitable.¹⁴ The parties lived together for fourteen years and during that time Patricia did not seek to enforce the child support obligation. Although there is evidence from Patricia and the parties' oldest daughter that Douglas provided sporadic support, the children were adequately provided for and have now reached majority. The circuit court's finding that the parties orally modified the

¹³ Patricia sought a quitclaim deed; reformation of the deed, however, is the appropriate remedy.

¹⁴ Whicker v. Whicker, 711 S.W.2d 857 (Ky.App. 1986).

support agreement is based on substantial evidence and will not be disturbed.

The case is reversed and remanded for entry of an order reforming the deed. It is affirmed as to the child support issue.

TACKETT, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

KNOPF, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: Respectfully, I concur in part and dissent in part from the majority opinion. I agree with the majority that the trial court did not error in its findings regarding child support. However, I disagree with the majority decision to set aside the trial court's finding that Patricia made a gift of an interest in the real property when she allowed Douglas's name to be placed on the deed. The majority opinion merely substitutes this Court's judgment for that of the trial court in determining the weight of the evidence.

Under Rakhman v. Zusstone,¹⁵ Patricia's placement of partial title in Douglas's name created a rebuttable presumption that she had made a gift of that interest to him. Once Patricia put contrary evidence in the record, Douglas bore the "risk of persuasion," by a preponderance of the evidence, that the

¹⁵ 957 S.W.2d 241 (Ky. 1997).

transaction was intended as a gift to him.¹⁶ Based upon the parties' conduct, the trial court concluded that Douglas met his burden of proof.

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."¹⁷ On appeal, this Court's basic concern is whether there is sufficient evidence, as detailed by the record, to support the decision of the trial court. If so, then the trial court's decision is not clearly erroneous.¹⁸ Moreover, where the trial court's decision is supported by substantial evidence, this Court is not authorized to substitute its own judgment for that of the trial court on the weight of the evidence.¹⁹

While the evidence was conflicting, the trial court's conclusion was supported by substantial evidence. The parties lived together for fourteen years after their divorce. On several different occasions, they jointly borrowed money to finance the land contract or improvements to the real property.

¹⁶ Id. at 245-46.

¹⁷ CR 52.01. See also Sexton v. Sexton, 125 S.W.3d 258, 269 (Ky. 2004), "[t]he determination of whether a gift was jointly or individually made is a factual issue, and therefore, subject to the CR 52.01's clearly erroneous standard of review".

¹⁸ Taylor v. Taylor, 591 S.W.2d 369, 370 (Ky. 1979).

¹⁹ Leveridge v. Leveridge, 997 S.W.2d 1, 2 (Ky. 1999); and Combs v. Combs, 787 S.W.2d 260, 262 (Ky. 1990).

During this period, they consistently held themselves out as husband and wife in financial and legal documents. Furthermore, Patricia had numerous opportunities to assert her rights under the settlement agreement even after the deed was issued in both of their names. But she never availed herself of these opportunities until after their relationship broke apart. Based on this evidence, the trial court could reasonably conclude that Patricia gave Douglas an interest in the real property. Therefore, I would affirm the trial court's order in its entirety.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Bonnie M. Brown
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEES:

Jane R. Butcher
BUTCHER LAW OFFICES, LLC
Williamsburg, Kentucky